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# Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully

## I. INTRODUCTION

Criminal prosecutors often are faced with the difficult task of persuading a jury to believe the testimony of a defendant's accomplices or of other informants.<sup>1</sup> Such testimony is inherently less reliable than that of other witnesses,<sup>2</sup> but because a successful prosecution may depend upon accomplice or informant testimony, prosecutors often offer these witnesses plea or immunity agreements in order to secure their testimony. As a part of such agreements, the prosecutor will usually require the witnesses to promise to testify truthfully at trial.<sup>3</sup> Prosecutors will use this promise to rehabilitate a witness whose credibility has been called into question; the prosecutor will argue that the witness should be believed because he or she would lose the benefits of the bargain with the prosecution should he or she fail to tell the truth at trial.<sup>4</sup> Although the prosecution is

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1. Use of the testimony of accomplices and other informers is widespread. See Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 679 & n.28 (1980). Professor Nemerson notes that

[a]lthough prosecutors would undoubtedly prefer to present cases against defendants on the testimony of religious leaders and others whose credibility is not open to serious challenge, many offenses are of such a nature that the only witnesses with compelling knowledge of incriminating facts are accomplices in the specific crime, or at least general criminal associates of the defendant.

*Id.* at 729 (footnote omitted).

Accomplices of defendants are competent witnesses, and in the federal courts defendants may be found guilty on the uncorroborated testimony of their accomplices. See *United States v. Rosson*, 441 F.2d 242, 244 (5th Cir.), *cert. denied*, 404 U.S. 843 (1971).

2. It is, of course, often in an accomplice's own interest to place guilt on the defendant, either to shift blame from the accomplice or to comply with a bargain that has been struck with the authorities. See *United States v. Lee*, 506 F.2d 111, 115 n.5, 118-19 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975). For a discussion of accomplice testimony, see Comment, *Accomplice Testimony Under Conditional Promise of Immunity*, 52 COLUM. L. REV. 138, 139 (1952). Juries are often informed of the dangers accompanying accomplice testimony. See, e.g., *United States v. Lee*, 506 F.2d 111, 118-19 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975) (cautionary instruction).

3. See note 8 *infra*.

4. If the plea bargain agreement is voided by failure to comply with all its terms, the witness will again be subject to the original charges.

justified in attempting to convince the jury of the witness's credibility, there are serious objections to using the truthfulness agreement to do so.

This Note will demonstrate that the use of truthfulness agreements to bolster credibility is functionally equivalent to prosecutorial "vouching"—an act that has been nearly unanimously labeled an abuse of the prosecutorial function by the federal courts.<sup>5</sup> The Note will then examine the ineffectiveness of current efforts to curb vouching, and will discuss the obstacles to elimination of the abuse of agreements to testify truthfully. Viewing the abuse of truthfulness agreements in the context of efforts to curb prosecutorial misconduct,<sup>6</sup> the Note concludes that truthfulness agreements should be excluded from evidence and that a per se rule of reversibility should be invoked when a prosecutor uses an agreement to testify truthfully to bolster the credibility of a witness.

## II. AGREEMENTS TO TESTIFY TRUTHFULLY AND PROSECUTORIAL VOUCHING

Plea bargains and immunity agreements are contracts between an individual and the government in which the government offers an inducement, such as a reduced charge or immunity from prosecution, in return for a guilty plea or testimony.<sup>7</sup> When testimony is the object of the agreement, the individual usually must promise to testify "fully and fairly" or "truthfully." This truthfulness agreement becomes part of the plea bargaining agreement, and if the witness does not testify truthfully he or she may lose the benefits of the plea bargain.<sup>8</sup>

The entire plea or immunity agreement, including the

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5. See notes 15 & 34 *infra* and accompanying text.

6. For a discussion of other types of prosecutorial misconduct, see Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 630-44 (1972).

7. The prosecutor has broad discretion in the formation of these agreements. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (plea bargains); *United States v. Hollinger*, 553 F.2d 535, 548 (7th Cir. 1977) (immunity agreements). The prosecutor's discretion in forming plea agreements is not totally without limitation, however. At least one court has reversed a conviction in which a cooperation agreement was conditioned upon the defendant's indictment and conviction, finding testimony pursuant to such an agreement "impure, dubious, and 'tainted beyond redemption.'" *People v. Green*, 102 Cal. App. 2d 831, 839, 228 P.2d 867, 871-72 (1951). The inducements for the witness to exaggerate testimony given such conditions are obvious. See Comment, *supra* note 2, at 139.

8. For example, in *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), the plea agreement provided that the witness would lose the benefits of his agreement "should he at anytime testify untruthfully." *Id.* at 532. In *United*

truthfulness agreement, may become relevant in judging the credibility of bargained-for testimony. Because evidence that a witness is testifying pursuant to a plea or immunity agreement is relevant to the witness's credibility,<sup>9</sup> the details of the "deal" probably will be elicited during cross examination.<sup>10</sup> During this cross examination, and later during the closing argument, defense counsel may attempt to discredit the witness by reminding the jury that the witness would say anything in order to reap the benefits of the agreement.<sup>11</sup> To rehabilitate the witness's credibility, the prosecution might turn to the truthfulness agreement—the existence of such an agreement arguably makes it more probable that the witness is telling the truth.<sup>12</sup>

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*States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978), the cooperation agreement stated:

The understandings are that Mr. Rivas shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this office inquires of him, and, further, shall truthfully testify at any trial or other court of Grand Jury proceeding with respect to any matters about which this office may request his testimony.

....  
If Mr. Rivas provides complete and truthful cooperation, he shall not be prosecuted by the Federal Government or New York State authorities for charges based on information he has supplied to this office.

*Id.* at 1145 n.9. Such language is typical of plea agreement provisions.

9. See *United States v. Roberts*, 618 F.2d 530, 535 (9th Cir. 1980); *United States v. Goodman*, 605 F.2d 870, 880 (5th Cir. 1979).

10. "The jury is entitled to consider and evaluate the interest that a witness may have as a consequence of a plea bargain." *United States v. Rosson*, 441 F.2d 242, 244 (5th Cir.), *cert. denied*, 404 U.S. 843 (1971). See also *United States v. Vida*, 370 F.2d 759, 767 (6th Cir. 1966), *cert. denied*, 387 U.S. 910 (1967). In fact, it is serious error for the prosecutor not to disclose the existence of a leniency agreement to the court and to defense counsel; such an action would, in effect, constitute the concealment of relevant evidence from the defense—evidence relating to the witness's credibility. See *United States v. Pope*, 529 F.2d 112, 114 (9th Cir. 1976). It is not proper, however, for the prosecutor to introduce the plea bargaining agreement during direct examination. See *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978). See also C. McCORMICK, *McCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE*, § 49, at 102 (2d ed. E. Cleary 1972).

11. One defense attorney phrased his credibility argument in the following manner:

Put yourself in the position of Mr. Rivas. Put yourself in the position of a man who is facing 20 years in jail, a man who looks forward to years and years and years locked up in a cell, rather than doing what he would want to do . . . . Ladies and gentlemen of the jury, I ask you, and you ask yourself, what would you do to avoid 20 years in jail.

*United States v. Arroyo-Angulo*, 580 F.2d 1137, 1147 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978). Some courts, however, have indicated that such remarks "invite" the prosecutor to reply with otherwise improper remarks. See note 49 *infra* and accompanying text.

12. The Court of Appeals for the Ninth Circuit discussed the case law on the admissibility of truthfulness agreements in *United States v. Roberts*, 618

Once the agreement to testify truthfully is put before the jury, the prosecution can incorporate a reference to it during the closing argument.<sup>13</sup>

Although useful for purposes of rehabilitating credibility, a prosecutor's reference during summation to a witness's agreement to testify truthfully may exceed the limits of legitimate argument if it constitutes improper "vouching"<sup>14</sup> for the witness's credibility. Courts agree that it is improper for a prosecutor to vouch for the credibility of a government witness.<sup>15</sup> Vouching statements amount to unsworn testimony<sup>16</sup> and infringe on the jury's role as factfinder by leading jurors to believe that credibility has been predetermined by the government.<sup>17</sup>

Improper vouching occurs in three general forms. First, it is improper for the prosecutor to express a personal opinion as to the credibility of testimony presented during the trial.<sup>18</sup>

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F.2d 530, 535-36 (9th Cir. 1980), and concluded that a "strong case" exists for the exclusion of truthfulness agreements. Only three other federal courts have addressed the question. In *United States v. Miceli*, 446 F.2d 256, 261 (1st Cir. 1971), the Court of Appeals for the First Circuit held that the admission of a truthfulness agreement was not plain error, although the opinion indicated that such a promise could have been excluded with a proper defense objection. Neither the Seventh Circuit nor the Second Circuit have objections to the use of truthfulness agreements. See *United States v. Creamer*, 555 F.2d 612, 617-18 (7th Cir.), *cert. denied*, 434 U.S. 833 (1977); *United States v. Koss*, 506 F.2d 1103, 1111, 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

13. If the truthfulness agreement was never introduced into evidence, any reference to the agreement during the closing argument is improper since it would refer to evidence outside the record. See note 20 *infra* and accompanying text.

14. "Vouching" as used in this Note is the act of giving personal assurance or supplying supporting testimony in attesting to the accuracy and truthfulness of a witness's statement. See *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980).

15. See, e.g., *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980); *United States v. Carleo*, 576 F.2d 846, 851-52 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978); *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977); *United States v. Daniel*, 422 F.2d 816, 817 (6th Cir. 1970); *United States v. Murphy*, 374 F.2d 651, 655 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967); *United States v. D'Antonio*, 362 F.2d 151, 155 (7th Cir.), *cert. denied*, 385 U.S. 900 (1966); *Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir. 1960). Accord, *McGhee v. State*, 274 Ala. 373, 373, 149 So.2d 5, 6 (1963); *People v. Pantages*, 212 Cal. 237, 247, 297 P. 890, 895 (1931); *East v. Commonwealth*, 249 Ky. 46, 54, 60 S.W.2d 137, 140 (1933).

16. "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination." *Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir. 1960).

17. See *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969).

18. For example, in one case a prosecutor said, "I *firmly* believe what [the police officers] said is the truth. I *know* it is the truth, and I expect you do,

Second, it is improper for the prosecutor to place the prestige of the government behind the witness's testimony, or to ask the jury to rely on the prosecutor's own credibility in assessing the veracity of someone he or she has put on the stand.<sup>19</sup> Third, it is improper for the prosecutor to refer to evidence that has not been admitted during the trial and argue that the additional facts lend support to the witness's testimony.<sup>20</sup> All such statements are highly prejudicial<sup>21</sup> and may deprive the defendant of a fair trial by permitting the jurors to determine credibility based on the prosecutor's assurances that the government would not lie to them.<sup>22</sup>

Courts commonly use one of two tests to determine whether or not a prosecutor has improperly vouched for the credibility of a witness. One test, focusing on the prosecutor's language itself, is objective: a prosecutor's remark will be held improper only if the prosecutor actually says or insinuates that a statement is based on matters within his or her personal

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too." *United States v. Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972) (emphasis in original). See *United States v. Gonzalez Vargas*, 558 F.2d 631, 633 (1st Cir. 1977); *Gibson v. United States*, 403 F.2d 569, 570 n.1 (D.C. Cir. 1968); ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(4) [hereinafter cited as ABA CODE]; C. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* § 525 (12th ed. 1975).

The prosecutor's statement, even though phrased to express a personal opinion, may be proper, however, if the remark is based on the evidence presented at the trial. An attorney "may argue, on his analysis of the evidence, for any position or conclusion with respect to the [witness's credibility]." ABA CODE, *supra*, DR 7-106(C)(4). See also C. TORCIA, *supra*, at § 525.

19. See, e.g., *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 1979) (prosecutor stated "you will find it is my job to call witnesses who know something about the case."). See also *United States v. Franklin*, 568 F.2d 1156, 1158 (8th Cir.), *cert. denied*, 435 U.S. 955 (1978).

20. Cf. *Ginsberg v. United States*, 257 F.2d 950, 954 (5th Cir. 1958) (the prosecutor stated: "I could probably have fifty people here who would show that [the defendant] isn't a good character."); *People v. Talle*, 111 Cal. App. 2d 650, 673, 245 P.2d 633, 647 (1952) (prosecutor stated that the jury could go to his office after the trial so the jury could see information not presented during trial).

21. See *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 1979).

22. As one author has noted,

[t]here are several reasons for the rule, long established, that a lawyer may not properly state his personal belief either to the court or to the jury in the soundness of his case. In the first place, his personal belief has no real bearing on the issue; no witness would be permitted so to testify, even under oath, and subject to cross-examination, much less the lawyer without either. Also, if expression of personal belief were permitted, it would give an improper advantage to the older and better known lawyer, whose opinion would carry more weight, and also with the jury at least, an undue advantage to an unscrupulous one. Furthermore, if such were permitted, for counsel to omit to make such a positive assertion might be taken as an admission that he did not believe in his case.

H. DRINKER, *LEGAL ETHICS* 147 (1953).

knowledge or personal opinion.<sup>23</sup> In *Lawn v. United States*,<sup>24</sup> the Supreme Court endorsed the use of an objective test, stating that a prosecutor's statement that "[w]e vouch for [the witnesses] because we think they are telling the truth"<sup>25</sup> was permissible because "[t]he Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury."<sup>26</sup>

The other test, focusing on the jury's reasonable inferences from the prosecutor's statements or insinuations, is subjective: a prosecutor's remarks will be held improper if the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness's credibility, supporting the witness with the government's credibility, or referring to outside knowledge.<sup>27</sup> The difference between the two tests is clear: a remark is proper under the objective test if it has *any* basis in the evidence, even if the jury could reasonably believe otherwise; a remark is proper under the subjective test only if the jury could not have reasonably believed that the prosecutor referred to improper facts, even if the remark had *some* basis in the evidence.<sup>28</sup> Although some courts have followed *Lawn*,<sup>29</sup> most courts that have recently considered the issue have adopted

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23. This standard apparently originated in *Berger v. United States*, 295 U.S. 78, 85 (1934).

24. 355 U.S. 339 (1957).

25. *Id.* at 359-60 n.15.

26. *Id.* at 360 n.15. Although there were additional reasons for finding that this remark did not deprive the defendant of a fair trial—the Court found that the defense counsel had invited the prosecutor's reply with remarks of his own and that the trial judge had instructed the jury that they should carefully scrutinize the testimony of the accomplices—these reasons do not diminish the importance of the objective test. The Court simply focused on what was actually said by the prosecutor and implied that the prosecutor's remarks would have been proper even if they had not been invited by the defense or if an accomplice instruction had not been given. *Id.* No reasonable inferences that the jury could draw from the statement or the prosecutor's insinuations were considered.

27. See, e.g., *United States v. Roberts*, 618 F.2d 530, 537 (9th Cir. 1980); *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979); *Gradsky v. United States*, 373 F.2d 706, 710 (5th Cir. 1967).

28. "The adverse impact of personal expression of opinion is still present, regardless of whether counsel purports to limit the basis of his opinion to the facts at trial." *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979).

29. See *United States v. Van Orden*, 469 F.2d 461, 465 (3d Cir. 1972), *cert. denied*, 410 U.S. 957 (1973); *United States v. Greer*, 467 F.2d 1064, 1072 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *United States v. Browning*, 390 F.2d 511, 514 (4th Cir. 1968); *Ferina v. United States*, 302 F.2d 95, 106 (8th Cir.), *cert. denied*, 371 U.S. 819 (1962).

the subjective test.<sup>30</sup>

When a prosecutor tells a jury that a witness's truthfulness agreement makes the witness more believable, the prosecutor is making a statement that is functionally equivalent to vouching for the witness's credibility. The inferences that a jury may reasonably draw from the prosecutor's reference to the truthfulness agreement directly correspond to statements that, if made directly, would constitute impermissible vouching. It is reasonable to expect that the jury will infer from the truthfulness agreement and the emphasis placed on it by the prosecutor that the prosecutor personally believes in the witness's credibility.<sup>31</sup> The jury knows that the witness promised to testify truthfully, that the prosecutor offered the testimony for their consideration, and that the prosecutor is giving the witness certain benefits in exchange for the testimony. Reference to the truthfulness agreement also leads to the inference that not only the prosecutor, but the "government" itself has verified the credibility of the witness. From the prosecutor's statement that the government is willing to treat the witness leniently in return for truthful testimony at trial, the jury may infer that the witness has been "compelled . . . to come forward and be truthful," suggesting that the government "knows what the truth is and is assuring its revelation."<sup>32</sup> Finally, the

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30. See *United States v. Roberts*, 618 F.2d 530, 537 (9th Cir. 1980); *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979); *United States v. Gonzalez Vargas*, 558 F.2d 631, 633 (1st Cir. 1977); *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977); *United States v. Leeds*, 457 F.2d 857, 861 (7th Cir. 1972); *Harris v. United States*, 402 F.2d 656, 658 (D.C. Cir. 1968).

31. It might be argued that the jury could infer the prosecutor's belief in the witness's credibility by the very fact that the defendant was brought to trial and that the prosecutor called the witness to the stand. Any such inference, however, is to some extent neutralized by the presumption of innocence. The jury would only infer that the government had enough evidence to bring the defendant to trial and that the prosecutor has reason to believe that the government witnesses are telling the truth, just as the jury might infer that the defense attorney has reasons to believe that the defense witnesses are telling the truth.

32. *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980). It is improper for the prosecutor to state explicitly that the government has verified the credibility of the witness. See note 19 *supra* and accompanying text. One prosecutor attempted to take advantage of the government's credibility in the following manner:

[T]he government representatives don't put a witness on the stand unless there appears to be some credibility, until he appears to be a truthful witness.

Certainly, the government has every opportunity to check out and to judge the credibility and truthfulness of [the witnesses] in this case, and in that context, we offered you their testimony.

*Gradskey v. United States*, 373 F.2d 706, 710 (5th Cir. 1967) (emphasis deleted).



prosecutor leaves the impression that there are facts outside of the record that support the credibility of the witness;<sup>33</sup> the jury can reasonably believe that the bargain would not have been made had the prosecutor not been able to establish the accuracy of the witness's testimony. Statements from which the jury may reasonably infer that the prosecutor is vouching should be considered as improper as express statements of vouching.

Prosecutorial use of truthfulness agreements to rehabilitate accomplices and other questionable witnesses improperly shifts the jury's focus away from the credibility of the witness to the credibility of the prosecutor and the government. This is not only improper because it constitutes a form of vouching for credibility but also because it is professionally questionable.<sup>34</sup> Prosecutors should not be permitted to circumvent the clear impropriety of the usual forms of vouching by making the insinuations implicit in the use of truthfulness agreements.<sup>35</sup> Prosecutors do have alternative methods of rehabilitating a witness whose credibility is attacked through a plea or immunity agreement,<sup>36</sup> and they should be forced to turn to those alternatives. Unfortunately, the current lack of judicial control over even the usual vouching techniques offers prosecutors little incentive to abandon the truthfulness agreement-based credibility argument.

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33. See note 20 *supra* and accompanying text.

34. The Code of Professional Responsibility requires the prosecutor to act with sound discretion, seeking justice, not merely convictions. See ABA CODE, *supra* note 18, EC 7-13. See also *Berger v. United States*, 295 U.S. 78, 88 (1934); ABA STANDARDS OF THE PROSECUTION FUNCTION § 1.1. The Code explicitly provides that a lawyer should not assert his or her personal opinion in a trial, "[s]tate or allude to any matter . . . that will not be supported by admissible evidence," or "[a]ssert his personal knowledge of the facts in issue except when testifying as a witness." See ABA CODE, *supra* note 18, DR 7-106(c)(4), (1), (3).

35. Although *Lawn v. United States* did not consider improper implications, see 355 U.S. 339, 359-60 n.15 (1957), there is language in *Berger v. United States*, 295 U.S. 78 (1934), that disfavors "improper suggestions [and] insinuations." *Id.* at 88. See *United States v. Dawkins*, 562 F.2d 567, 569 (8th Cir. 1977) (if prosecutor had implied that he had evidence not available to the jury, conduct would have been improper); *United States v. Leeds*, 457 F.2d 857, 861 (2d Cir. 1972) (prosecutor did not imply that he had personal knowledge based on matter extraneous to the record).

36. See notes 76-80 *infra* and accompanying text.

### III. OBSTACLES TO JUDICIAL CONTROL OVER VOUCHING AND MISUSE OF TRUTHFULNESS AGREEMENTS

Many courts have evinced a concern about the abuses of prosecutorial vouching, and at least one court has specifically concluded that the use of truthfulness agreements produces similar results.<sup>37</sup> The courts have nevertheless failed to address the problem adequately.<sup>38</sup> Because they are contained within clearly admissible plea or immunity agreements,<sup>39</sup> agreements to testify truthfully have been admitted into evidence without serious difficulty.<sup>40</sup> Once the agreements are admitted into evidence, prosecutors are able to exploit truthfulness agreements in closing arguments. The use of truthfulness agreements is permitted in objective vouching jurisdictions because the agreement itself is in evidence: the prosecutor's remarks have some basis in the evidence and the courts do not consider the jury's reasonable inferences from the prosecutor's remarks.<sup>41</sup> Although courts in subjective vouching jurisdictions apply a broader test by examining the jury's reasonable inferences from knowledge of a truthfulness agreement,<sup>42</sup> they generally have not taken the next logical step of concluding that improper vouching has occurred. As one such court stated in its analysis of personal opinion arguments, an "expression of personal belief may be tolerated if it is based *solely* on the evidence introduced and the jury is not led to believe that other evidence, unavailable to them, justified the be-

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37. See *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980).

38. Other sanctions might be directed at the prosecutor. First, there is discipline by the legal profession if the prosecutor has violated a disciplinary rule. See note 34 *supra*. Although instances of prosecutorial misconduct are documented repeatedly in appellate opinions, bar associations have "rarely invoked [disciplinary proceedings] as a corrective for courtroom misconduct by prosecutors." Alschuler, *supra* note 6, at 670-71 (footnotes omitted). Secondly, prosecutors could be cited for contempt when they are guilty of courtroom misconduct. "This sanction can be easily and quickly administered, and it permits substantial flexibility in adjusting penalties to reflect the severity of the prosecutor's misconduct. The authorized penalties range from suspended sentences and token fines to larger fines, jail terms, and indefinite suspension from the practice of law." *Id.* at 673. Alschuler found that this remedy is also rarely used. *Id.* at 674. But see *United States v. Berry*, 627 F.2d 193, 198 n.5 (9th Cir. 1980) (the court announced that it is now prepared to cite prosecutors for improperly vouching for their witnesses).

39. See notes 7-9 *supra* and accompanying text.

40. The few appellate courts that have considered the admissibility of agreements to testify truthfully have not conclusively resolved the issue. See note 12 *supra*.

41. See note 23 *supra* and accompanying text.

42. See notes 27-30 *supra* and accompanying text.

lief."<sup>43</sup> Such an analysis frequently results in a finding that the prosecutorial remarks are "questionable," but not improper.<sup>44</sup> Thus, most courts do not reach the question of whether the failure of the trial court to prohibit the use of the truthfulness agreement in closing argument is prejudicial error.

A determination that any particular prosecutorial comment is improper does not necessarily mean that the case will be reversed on appeal; the harmless error doctrine<sup>45</sup> permits courts to affirm convictions despite "outrageous" prosecutorial conduct that is "unethical, highly reprehensible, and merits unqualified condemnation."<sup>46</sup> Several factors may cause an appellate court to conclude that an otherwise prejudicial remark is nonetheless harmless error. First, the court may find that overwhelming evidence of guilt would have made it difficult for the jury to acquit even in the absence of the error.<sup>47</sup> Second, the court may find that the error was harmless because the defense did not object at the time the remark was made.<sup>48</sup>

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43. *United States v. Rodriguez*, 585 F.2d 1234, 1243 (5th Cir. 1978), *cert. denied*, 101 S. Ct. 108 (1980) (emphasis added). See *United States v. Martinez*, 466 F.2d 679, 683 (5th Cir. 1972), *cert. denied*, 414 U.S. 1065 (1973); *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955).

44. One court, for example, approved a statement in which the prosecutor said that he did not "hesitate for a moment standing by the testimony" of the witness and that the testimony "rang of truth." *United States v. Dawkins*, 562 F.2d 567, 569 (8th Cir. 1977). The court noted: "Arguably this statement is open to the charge that it expresses the prosecutor's personal opinion concerning the believability of [the witness]," but nevertheless went on to approve of the statement. *Id.* A court following the lead of the Sixth Circuit would find this type of comment improper, however, on the ground that personal belief arguments are improper, even when they are based solely on the evidence presented at trial. See *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979).

45. FED. R. CRIM. P. 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See *United States v. Handly*, 591 F.2d 1125, 1132 (5th Cir. 1979); *United States v. Rodriguez*, 585 F.2d 1234, 1244 (5th Cir. 1978), *cert. denied*, 101 S. Ct. 108 (1980); *United States v. Spain*, 536 F.2d 170, 176 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976).

46. *Baker v. United States*, 115 F.2d 533, 543 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941), *quoted in* Alschuler, *supra* note 6, at 659.

47. See *United States v. Rodriguez*, 585 F.2d 1234, 1244 (5th Cir. 1978), *cert. denied*, 101 S. Ct. 108 (1980); *United States v. Gallagher*, 576 F.2d 1028, 1042 (3rd Cir. 1978), *cert. dismissed*, 444 U.S. 1040 (1980); *People v. Marable*, 58 A.D.2d 877, 878, 396 N.Y.S.2d 696, 697 (1977). In cases in which the evidence of guilt is not overwhelming, the same error may be prejudicial and "may carry 'much weight against the accused when they should properly carry none.'" *United States v. Diharce-Estrada*, 526 F.2d 637, 642 (5th Cir. 1976) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

48. See *United States v. Franklin*, 568 F.2d 1156, 1159 (8th Cir.), *cert. denied*, 435 U.S. 955 (1978). The rationale may be that if the remark was prejudicial, the defense would have objected at the time. See *United States v. Arteaga-Limones*, 529 F.2d 1183, 1190 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *United*

Third, the "invited error" doctrine may apply: the prosecutor's remark may be held justifiable as a response to comments from the defense counsel.<sup>49</sup> Finally, the trial judge's curative instructions to the jury may be found to have neutralized the otherwise prejudicial statement.<sup>50</sup>

Courts have thus far had little difficulty excusing the use of truthfulness agreements under the harmless error doctrine even if their use could have been considered improper. In *United States v. Koss*,<sup>51</sup> for example, the court reasoned that the use of the truthfulness agreement was permissible because the defense attorney had challenged the witness's credibility.<sup>52</sup> Likewise, in *United States v. Aloï*,<sup>53</sup> the court noted that the effects of the agreement were moderated by the defendant's counsel, who had challenged the veracity of the government witnesses day after day.<sup>54</sup> The result is that prosecutors are able to make highly questionable statements without having to worry about a reversal; their greatest worry may be that of receiving caustic comments from appellate judges.<sup>55</sup>

Judicial reluctance to insist upon a universal requirement of reversal even when vouching or other prosecutorial misconduct is found to be prejudicial to a defendant's case is the final

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*States v. Johnson*, 331 F.2d 281, 282 (2d Cir.), *cert. denied*, 379 U.S. 905 (1964); *Manion v. State*, 339 So. 2d 147, 150 (Ala. Ct. App. 1976). *But see* FED. R. CRIM. P. 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

49. The rationale for this rule is that since the defense counsel "asked" for the comment, he or she is in no position to object later. *See United States v. Milne*, 498 F.2d 329, 330 (5th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); *United States v. Hoskins*, 446 F.2d 564, 565 (9th Cir. 1971); *People v. Bolton*, 35 Ill. App. 3d 965, 973, 343 N.E.2d 190, 197 (1976); *Johnson & Southard, Prosecutorial Misconduct in Closing Argument: Does Harmless Error Mean Never Having to Say "Reversed?"*, 49 J. KANSAS B.A. 205, 224 (1980).

50. *See United States v. Handly*, 591 F.2d 1125, 1131 (5th Cir. 1979); *United States v. Daniel*, 422 F.2d 816, 817 (6th Cir. 1970); *Keeble v. United States*, 347 F.2d 951, 956 (8th Cir.), *cert. denied*, 382 U.S. 940 (1965). *But see People v. Pantages*, 212 Cal. 237, 249, 297 P. 890, 895 (1931) (exception to the general rule when the misconduct is such that it is reasonably clear that its harmful effects cannot be obviated or remedied by an instruction); *People v. Wright*, 17 A.D.2d 151, 153, 232 N.Y.S.2d 767, 769 (1962) (prejudice flowing from prosecutor's statement could not be cured by trial court's instruction), *cert. denied*, 379 U.S. 938 (1964).

51. 506 F.2d 1103 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

52. *Id.* at 1112-13.

53. 511 F.2d 585 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975).

54. *Id.* at 598.

55. *See* note 59 *infra* and accompanying text. "It is the harmless error doctrine that, more than any other procedural rule, accounts for the relative ineffectiveness of appellate review in controlling prosecutorial misconduct today." *Alschuler, supra* note 6, at 659.

obstacle to the effective control of the misuse of truthfulness agreements. Courts have tended to analyze cases individually;<sup>56</sup> new trials have been ordered only when, in light of the entire record,<sup>57</sup> "egregious" prosecutorial errors have "irreparably prejudiced the defendant."<sup>58</sup> Courts have preferred to threaten future reversals rather than to order new trials. As the constant stream of warnings from the appellate courts clearly demonstrates, however, such threats are ineffective.<sup>59</sup> A warning accompanied by an affirmed conviction has no effect on the particular case under review and the prosecutor has no motivation to change his or her behavior in a future case. Until the courts recognize that mere warnings are futile,<sup>60</sup> vouching will continue unabated.<sup>61</sup>

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56. See, e.g., *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979).

57. See *United States v. Dawkins*, 562 F.2d 567, 568-69 (8th Cir. 1977).

58. *United States v. Carleo*, 576 F.2d 846, 851-52 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978). Apparently, the feeling is that a per se rule would be too inflexible; courts do not want to reverse convictions, despite prosecutorial misconduct, when one or more of the harmless error factors are present.

59. In *United States v. Spain*, 536 F.2d 170 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976), for example, the court warned:

The records before us recently have too often disclosed prosecutorial arguments which, while not rising to the level of plain error, were nevertheless improper. If this continues, this court may find it necessary in appropriate cases to exercise its supervisory authority, even in the absence of plain error. In the future all federal prosecutors in this circuit will confirm [*sic*] their arguments to the standards set by the Supreme Court in the *Berger* case.

536 F.2d at 176 (citing *Berger v. United States*, 295 U.S. 78 (1934)). The same court, however, was forced to repeat its warning the following year, this time threatening that "the prosecution will face the substantial risk of having a conviction set aside." *United States v. Hollinger*, 553 F.2d 535, 548 (7th Cir. 1977). Another court referred to its "constant admonitions" against prosecutors expressing their personal opinions. *United States v. Gonzalez Vargas*, 558 F.2d 631, 633 (1st Cir. 1977). A third noted that "improper statements in summation is a continuous problem in this Court in civil and criminal jury trials." *United States v. Handly*, 591 F.2d 1125, 1132 (5th Cir. 1979).

60. The Ninth Circuit recently recognized the futility of its warnings: "Continuing to issue admonitions serves little purpose if we affirm convictions in criminal cases while tolerating prosecutors who lack judgment, common sense and knowledge of appropriate courtroom conduct and permissible argument." *United States v. Berry*, 627 F.2d 193, 198-99 n.5 (9th Cir. 1980).

61. Only the Ninth Circuit appears to be ready to adopt a rule forbidding the introduction and use of agreements to testify truthfully. See *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980). Although the court did not say that use of truthfulness agreements would be per se reversible error, *Roberts* can be interpreted to mean that their improper use would be reversible error when the court is "not persuaded that the jury would have convicted the defendants had it not been exposed to improper argument." *Id.* at 535.

## IV. A PROPOSED SOLUTION

The tone of appellate court warnings<sup>62</sup> indicates that courts would welcome a solution to the problem of prosecutorial vouching. An effective solution, however, must recognize the legitimate need of the prosecutor to rehabilitate a witness's credibility through persuasive argument to the jury. The prosecutor should not be forced into a position in which his or her only function is to deliver a dry recitation of the evidence—"[t]o shear [the prosecutor] of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice."<sup>63</sup> Courts are unlikely, therefore, to alter their present level of discretionary control over the general forms of vouching.<sup>64</sup> Unlike many forms of prosecutorial misconduct, however, truthfulness agreements are used as a vouching device only in a particular trial context,<sup>65</sup> and as such are subject to the strictures of the law of evidence.

A witness's agreement to testify truthfully is offered because of its purported relevance<sup>66</sup> to the issue of the witness's credibility.<sup>67</sup> Because the witness is already required to take an oath or affirmation at trial, however, the probative value of the truthfulness agreement is minimal.<sup>68</sup> The jury determines the witness's credibility based on the testimony given under this oath, not on statements sworn to before the trial.<sup>69</sup> Moreover, the prejudicial impact of the truthfulness agreement, and the possibility that the jury will use it improperly, outweigh whatever legitimate value it might have. As has been shown,<sup>70</sup> a jury might reasonably infer from a credibility argument based on the truthfulness agreement that the prosecutor believes the witness is telling the truth, that the government has verified

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62. See note 59 *supra*.

63. *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925), *quoted in United States v. Spain*, 536 F.2d 170, 174 (7th Cir. 1976).

64. See note 56 *supra* and accompanying text.

65. See notes 9-13 *supra* and accompanying text.

66. Relevant evidence is evidence having a tendency to make a fact more or less probable. See FED. R. EVID. 401. Relevant evidence can be excluded, however, when its probative value is substantially outweighed by a risk of undue prejudice, confusion, or waste of time. See FED. R. EVID. 403. Rule 403 thus permits a balancing process to determine the admissibility of credibility evidence. See, e.g., *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980).

67. See note 12 *supra* and accompanying text.

68. The oath is not merely symbolic; it impresses upon the witness the necessity of telling the truth. See *C. McCormick, supra* note 10, at 582.

69. Prosecutorial comments should add "nothing of substance to the credibility of a witness who in all events has sworn to tell the truth." *United States v. Dawkins*, 562 F.2d 567, 569 (8th Cir. 1977).

70. See notes 31-33 *supra* and accompanying text.

the witness's credibility, and that there is outside evidence that supports the witness's testimony. Indeed, the prosecutor is likely to encourage the jury to draw these inferences.<sup>71</sup> This prejudicial impact is sufficient to exclude the truthfulness agreement in subjective vouching jurisdictions.<sup>72</sup> Because the use of the truthfulness agreement is the functional equivalent of making express improper statements to the jury, the agreement should be excluded in objective jurisdictions as well.<sup>73</sup> Therefore, an application of the balancing test used under Federal Rule of Evidence 403<sup>74</sup> requires truthfulness agreements to be excluded from the evidence because their minimal probative value is outweighed by a disproportionate risk of undue prejudice.

The use of truthfulness agreements can also be eliminated because there are legitimate, effective alternatives available to the prosecutor in arguing credibility to the jury.<sup>75</sup> The prosecutor can point out that the witness took an oath and that if the witness lies in court, he or she can be prosecuted for perjury.<sup>76</sup> Such a statement would shift the emphasis from the truthfulness agreement to the oath taken before the testimony was given at trial.<sup>77</sup> The prosecutor can also explain to the jury why the government finds it necessary to use an accomplice or any other culpable person as a witness.<sup>78</sup> Jury members might thus

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71. During closing arguments, counsel are permitted to draw inferences favorable to their position as long as the inferences are based on the evidence presented at trial. See *Borgia v. United States*, 78 F.2d 550, 554 (9th Cir.), *cert. denied*, 296 U.S. 615 (1935).

72. See note 27 *supra* and accompanying text.

73. See note 23 *supra* and accompanying text.

74. See note 66 *supra*. This part of an otherwise admissible plea or immunity agreement may be excluded simply by removing the improper material from the rest of the document. In *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), the court cited a case in which part of a plea agreement was excluded. *Id.* at 535. In *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978), the plea agreement referred to the fact that the witness's family was in protective custody; such material was properly deleted from the plea agreement because it was irrelevant and prejudicial. *Id.* at 1145.

75. The availability of non-prejudicial evidence is a consideration included in the balancing test allowed by Federal Rule 403. As the Advisory Committee's Notes to that rule state: "The availability of other means of proof may also be an appropriate factor."

76. See *United States v. Ricco*, 549 F.2d 264, 274 (2d Cir.), *cert. denied*, 431 U.S. 905 (1977).

77. See note 69 *supra* and accompanying text.

78. See, e.g., *United States v. Roberts*, 618 F.2d 530, 534 n.1 (9th Cir. 1980) ("We suggest that [the prosecutor] might appropriately explain to the jury the necessity of using unsavory witnesses."). The prosecutor might point out, for example, that accomplices are the only parties who would have sufficient information to incriminate the defendant, that no other people have knowledge of

understand that there may be no other way to obtain evidence to incriminate the defendant.<sup>79</sup> The prosecutor can also bring to the jury's attention the witness's demeanor and manner of speaking during the trial.<sup>80</sup> Finally, the prosecutor can suggest that because the witness has already admitted his or her guilt and has pled guilty or has been given immunity from prosecution, the witness has nothing to gain from lying in court. Instead of stating that the witness came to court to tell the truth, the prosecutor could say that the witness came to tell his or her version of the facts—what the witness thinks the truth is. All of these alternatives shift the jury's attention away from the credibility of the prosecutor and the government and toward assessing whether or not the witness is worthy of credibility when standing alone.

An exclusionary rule for truthfulness agreements is completely consistent with the subjective vouching test used by most courts today; furthermore, appellate courts should welcome a solution that operates at the trial level to prevent at least some vouching problems from reaching them. Excluding truthfulness agreements would lead courts that use the subjective vouching test to a conclusion already implicit in the subjective vouching theory; the prejudicial impact of the truthfulness agreement arises when jurors draw inferences from the knowledge that such an agreement is part of the plea or immunity "deal" with the government.<sup>81</sup> An exclusionary rule, however, would not be consistent with the objective test; the courts that apply this test do not consider remarks improper when the jury can draw reasonable inferences of vouching from otherwise proper arguments.<sup>82</sup> Nevertheless, it is difficult to justify the continued use of the objective test; the distinction between actually stating something improperly to the jury or implying it is plainly artificial—the jury will reach the same conclusions in ei-

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the conspiracy, and that without the accomplice's testimony, the defendant would go unpunished.

79. See Nemerson, *supra* note 1, at 729 n.183. "This is particularly true in prosecutions of high level drug dealers and organized crime figures—prosecutions in which incriminating evidence may be available only from others lower down in the criminal hierarchy." *Id.*

80. Prosecutors may refer "to the witness's manner of testimony in court before the jury. Such description of testimony does not constitute error for it neither puts the prosecutor's own credibility before the jury nor does it carry any inference of outside knowledge." *United States v. Dawkins*, 562 F.2d 567, 569 (8th Cir. 1977).

81. See notes 31-33 *supra* and accompanying text.

82. See notes 23-26 *supra* and accompanying text.



ther case.<sup>83</sup> The objective test should also be rejected because it is based on an unsound understanding of the common law rule that counsel could not impeach their own witnesses.<sup>84</sup> Recent changes in evidence rules that allow counsel to impeach their own witnesses<sup>85</sup> render the Court's understanding in

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83. See *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980); *United States v. Bess*, 593 F.2d 749, 756 (6th Cir. 1979). The prosecutor's arguments should be prohibited for the same reasons that explicit statements of this nature are prohibited. As the Supreme Court stated in *Berger v. United States*, 295 U.S. 78 (1935), "[I]mproper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.* at 88.

84. The *Lawn* rule is apparently based on an unsound understanding of the common law advanced by the government in the case. The government contended that "[t]here was no suggestion in [the prosecutor's] remarks that he was basing his conclusion on facts outside the record before the jury or that he had independent knowledge of petitioner's guilt." Brief for the United States at 52-53. During closing arguments, the prosecutor said:

I vouch for Lubben. The Government put Lubben on the stand because it thought that Lubben could be vouched for.

I vouch for Roth also. . . .

. . . .

I vouch for them (and I will explain precisely why I do in just a moment, but I vouch for them[]). When I say "I," I am referring to the District Attorney's office and I merely represent them. We vouch for them because we think they are telling the truth.

Record, vol. 3, at 2587-2588. The government argued that the remarks were unobjectionable under "the general common law rule that the party who puts on a witness, 'under familiar rules of evidence, vouches for his credibility.'" Brief for the United States at 52 (quoting *Bowles v. Marx Hide & Tallow Co.*, 153 F.2d 146, 147 (6th Cir. 1946)). The government also contended that the "affirmation of belief [in the witness] merely put into words what the very fact of prosecution implied." *Id.* at 52 (citing *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 637 (2d Cir. 1946)). *Lawn* contended that under the common law, vouching for witness credibility meant only that the prosecutor could not impeach his or her own witness—the rule was not meant to allow prosecutors to testify to witness credibility. See *Petitioner's Reply Brief* at 11.

The Court rejected *Lawn's* arguments and adopted a standard that was almost identical to the government proposal. The Court may have been persuaded by the government's contention that vouching in this manner was allowed by the common law. Neither of the cases cited by the government in *Lawn*, however, offered strong support for the propriety of the prosecutor's comments in that case. *Bowles* was a civil action; even if counsel is allowed to vouch for witnesses in that setting, the rule may not be appropriate for a criminal trial. The *Antonelli* court also offered no explanation for its statement that the fact of prosecution implies an affirmation of belief, but relied on a case condoning improper prosecutorial comment because of the overwhelming evidence of defendant's guilt. See *Meyer v. United States*, 258 F. 212, 215 (7th Cir. 1919).

Although the government was correct in stating that the common law requires counsel to "vouch" for his or her witness, *Lawn's* explanation of that rule was correct: that a party vouches for the credibility of his or her witnesses means only that counsel cannot impeach his or her own witness. See *People v. Wright*, 17 A.D.2d 151, 153, 232 N.Y.S.2d 767, 768-69 (1962) ("The rule does not contemplate that a district attorney may by reason of his official position and personal knowledge of the facts certify that the witness is telling the truth.");

85. See *FED. R. EVID.* 607 & Advisory Committee Note.

*Lawn* not only unsound, but outdated.

Once the rule excluding truthfulness agreements has been adopted, appellate courts must apply the rule by reversing a conviction should the trial court commit error in allowing the agreement to be introduced or in allowing the prosecutor to refer to its terms in summation. Reference to a truthfulness agreement in a closing argument when the agreement has specifically been excised from the evidence is an improper reference to matters outside the evidentiary record and is a clear ground for reversal and a new trial order.<sup>86</sup> Moreover, courts should also find that closing arguments based on improperly admitted truthfulness agreements constitute improper vouching and deprive the defendant of a fair trial, and therefore also constitute reversible error.<sup>87</sup> Such a rule of reversal is the only way to prevent future misconduct that might otherwise be labeled "harmless;" it will deter prosecutors from using truthfulness agreements at trial because they will know that trial court acceptance will be error and will result in reversal on appeal.<sup>88</sup> Because the truthfulness agreement adds little to the issue of credibility<sup>89</sup> and creates such a large potential for abuse,<sup>90</sup> the initial expense of new trials is justified in view of the harmful effects that will be eliminated.

## V. CONCLUSION

One might ask whether it will make any difference if the prosecutor is not allowed to enhance witness credibility with the use of a truthfulness agreement; jurors probably realize that the government believes that the witnesses it puts on the stand will aid the prosecution. Clearly jurors may properly entertain their own inferences from the government's actions. A juror might base a credibility decision on the wrong factors, however, when the prosecutor, with the court's blessing, tells the jury that a witness promised that he or she would come to court and tell the truth at the risk of the bargain, and that because the witness has told the truth, he or she will not be punished as severely as he or she otherwise would have been.<sup>91</sup>

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86. See *United States v. Roberts*, 618 F.2d 530, 534-35 (9th Cir. 1980).

87. The unfair trial is the result of a reference to inadmissible evidence. See note 20 *supra* and accompanying text.

88. See notes 59-61 *supra* and accompanying text.

89. See note 69 *supra* and accompanying text.

90. See generally *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980).

91. The United States Supreme Court exercised its powers in formulating such a rule excluding prosecutor testimony on matters having a similar poten-

The beneficial effect of any change in trial procedures—including the exclusion of truthfulness agreements—should not be measured by the number of acquittals that might otherwise have been convictions. Rather, the purpose of the exclusionary rule proposed in this Note is to sanitize criminal trials by eliminating misleading and improper prosecutorial influence on the jury. Adoption of the proposed rule would allow juries to base their decisions on what they see and hear in the courtroom and not on the testimonial actions of counsel.

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tial to mislead jurors in *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, the Court concluded that it was a violation of the self-incrimination clause of the constitution for a prosecutor or a court to comment on the defendant's failure to testify. *Id.* at 615. Thus convictions will be reversed because of the prohibited prosecutorial comments, even if there is overwhelming evidence of guilt. A similar rule, although not necessarily of a constitutional dimension, should be adopted in the context of prosecutorial vouching via truthfulness agreements, stating that prosecutorial vouching, and the use of the truthfulness agreement to achieve that result, is a denial of a fair trial.